INDEX

Subject Index

	Page
Petition for writ of certiorari	1
I. Summary of matter involved	1
A. Petitioner's complaint	2
B. Respondent's answer	2
C. The proof	2
D. Judgment of District Court	4
E. Decision of Court of Appeals	4
II. Questions presented	4
III. Reasons relied upon for the allowance of the writ	5
Brief in support of petition	7
I. Opinions of courts below	7
II. Jurisdiction of this court	7
III. Statement of the case	8
IV. Specification of errors	8
V. Summary of argument	8

Table of Cases Cited

Erie R. R. Co. v. *Tompkins*, 304 U. S. 64 ..... 1, 4, 5, 12

Manchester v. *Youngstown Sheet & Tube Co.*, 46 N. E. (2) 780 ..... 4, 9, 13

Standard Oil Co. v. *Anderson*, 212 U. S. 215 ..... 4, 5, 12

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 129

EDWARD McANDREWS,
Petitioner and Appellant Below,

vs.

E. W. BLISS COMPANY,
Respondent and Appellee Below

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the United States:

Summary of Matter Involved

The legal question here involved is whether the District Court and the Court of Appeals may ignore and disregard the law pronounced by this Court in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and refuse to apply the law of the State of Ohio as declared by the highest state court.

This is an action at law brought in the United States District Court, for the Northern District of Ohio, Eastern

Division, by Edward McAndrews, petitioner herein, against E. W. Bliss Company, respondent herein, for damages for personal injuries.

At the conclusion of all the evidence, the trial court instructed the jury to return a verdict in favor of respondent (R. 127). The petitioner prosecuted appeal, and the judgment of the trial court was affirmed by the Court of Appeals.

A. Petitioner's Complaint

The complaint (R. 2) alleged that as a result of the negligence of defendant, petitioner, on May 8, 1948, sustained severe bodily injuries while in the employ of Eichelay Corporation, engaged, as an independent contractor, in dismantling an overhead traveling crane in the plant of respondent at Salem, Ohio (petitioner while working on said crane, which was being dismantled, was crushed between said crane and the building, when another crane of respondent was caused to bump into the one on which he was working).

B. Respondent's Answer

On September 25, 1948, respondent filed its answer (R. 5) and asserted several defenses, but the one with which we are here concerned is respondent's assertion "that all operations then being performed in connection with said work were done by and at the direction of said Eichelay Corporation"—petitioner's employer.

C. The Proof

The Eichelay Corporation, herein called Eichelay, as an independent contractor, was engaged in dismantling a "dead" overhead traveling crane at respondent's plant, and in erecting a new one to replace it.

Respondent introduced testimony to the effect: that Norman O. Price, foreman for Eichelay, was in charge of the work: that at the request of Price, a few hours before the accident, Michael Ulitchny, maintenance foreman for respondent, assigned one Gerald Hall, a crane operator in the regular and general employ of respondent, to operate a "live" crane if and when so requested by Price (R. 77): that Price, in accordance with such arrangement, from the floor below, directed Hall, located in the cab of the "live" crane overhead, to move the crane until it came in contact with the crane to be dismantled (R. 90): that Hall obeyed the order and in its performance the live crane bumped into the "dead" one, upon which petitioner was working, and as a result petitioner was injured (R. 117).

Petitioner introduced testimony to the effect that prior to the happening of said accident, petitioner and three of his co-employees moved said "dead" crane manually, by hand, whenever the occasion required its being moved; that they had not been advised that respondent's "live" crane and operator would assist them in any way (R. 13, 14, 16, 36, 39, 52, 59); and that the "dead" crane was rammed so hard by the "live" crane that petitioner was knocked from his position and injured (R. 15).

Although respondent claimed that its said plant was not being operated on the day of the accident, the "live" crane and crane operator were "on the job"—not exclusively for the benefit of Eichelay—as is shown by the testimony of respondent's maintenance foreman, Ulitchny: "In the nature of our work we have to have an operator because we repair machinery in other departments, and therefore we have to have lifts now and then." (R. 80) and "Well, we have a crane operator there at all times." (R. 80).

And it is undisputed that said crane operator's wages for the day in question were paid by his employer, respondent herein (R. 118).

D. Judgment of the District Court

The District Court refused to submit to the jury the question of whether the crane operator was a servant of the independent contractor or of respondent; and at the close of all the testimony directed a verdict for the respondent, holding that the crane operator was not acting as the agent of the respondent (R. 127, 135).

E. Decision of Court of Appeals

The Court of Appeals held that the crane operator was, at the time of the accident, in the special service of Eichelay, who, it held, with reference to the details of the work, was an independent contractor over whom this respondent had no control whatever; and that the district court was right in granting the motion for peremptory instructions and in entering judgment for this respondent.

The court's Per Curiam opinion made no mention of the Ohio law pronounced in the case of *Manchester* v. *Youngstown Sheet & Tube Co.*, hereinafter referred to.

II

Questions Presented

The questions presented are as follows:

1. May the District Court and the Court of Appeals ignore and disregard the law pronounced by this Court in the case of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, and refuse to apply the law of the State of Ohio as declared by the highest state court?

2. May the District Court and the Court of Appeals disregard the law pronounced by this Court in the case of *Standard Oil Co.* v. *Anderson*, 212 U. S. 215?

3. Where the undisputed facts disclose that a servant is merely sent to do work pointed out to him by a person who has made a bargain with his master does that make him that person's servant?

III

Reasons Relied upon for the Allowance of the Writ

We respectfully submit that this petition for writ of certiorari should be granted for the following reasons:

A. The decisions of the District Court and of the Court of Appeals in ignoring and refusing to apply the law of the State of Ohio as declared by the highest state court are decisions of important questions of local law in conflict with local applicable decisions.

B. The decisions of the District Court and of the Court of Appeals are in conflict with the law laid down by this Court in the cases of *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, and *Standard Oil Co.* v. *Anderson,* 212 U. S. 215.

C. The decisions of the District Court and of the Court of Appeals so far depart from the usual and accepted judicial course of proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals, for the Sixth Circuit, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on its docket No. 11,165, Edward McAndrews, Appellant, *vs.* E. W. Bliss Company, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgments

herein of said Court of Appeals and of the District Court be reversed by this Court, and for such further relief as to this Court may seem proper.

SAMUEL T. GAINES,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 129

EDWARD McANDREWS,
Petitioner and Appellant Below,

vs.

E. W. BLISS COMPANY,
Respondent and Appellee Below

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I

Opinions of Courts Below

The opinion of the Court of Appeals is reported in 186 F. (2) 499.

The opinion of the District Court is found on page 127 of the record.

II

Jurisdiction of This Court

The date of the judgment to be reviewed is January 25, 1951 (R. 145).

On April 20, 1951, Justice Reed signed order extending time to file this Petition to and including June 20, 1951.

The statutory provision which is believed to sustain the jurisdiction of this Court is:

28 U. S. C. A., Sec. 347.

III

Statement of the Case

We have heretofore recited in our petition all the facts essential to a determination of the law applicable.

IV

Specification of Errors

1. The Court of Appeals erred in affirming the judgment of the District Court.

2. The Court of Appeals erred in not reversing the judgment of the District Court.

3. The Court of Appeals erred in holding, upon the facts disclosed by the evidence, that the crane operator, who was a general employee of respondent, was in the special service of the independent contractor.

4. The Court of Appeals erred in holding that the question of whether or not the crane operator was the servant of respondent was not a question of fact for the jury.

V

Summary of Argument

The evidence shows that Hall, the crane operator, was the servant of the respondent, or at least the evidence was more than sufficient to require its submission to a jury on that proposition:

1. Edward McAndrews, petitioner, was an employee of Eichelay Corporation, an independent contractor (R. 10).

2. The Eichelay Corporation, in doing its work under its contract with E. W. Bliss Company, respondent herein, needed the use of a crane; and a few hours before the accident some arrangement was made between Ulitchny and Price by which the Eichelay Corporation could use in their work, as independent contractor, the crane of E. W. Bliss Company (R. 77).

3. Gerald Hall, an employee of E. W. Bliss Company, was the crane man, and when he went to work the day of the accident, he was ordered by his foreman, Michael Ulitchny, an employee of E. W. Bliss Company, to go and operate the crane (R. 77, 114).

4. The operator, Hall, was directed by Price, a foreman of the Eichelay Corporation, to move the crane until he had made contact with the dead crane; and on this trip the accident occurred (R. 90, 91).

5. No compensation was paid Hall, the crane operator, by the Eichelay Corporation. He was paid by his employer, respondent herein (R. 118, 123).

6. The arrangement for the use of the crane and its operator was made subsequent to the making of the original contract (R. 77); and no written or verbal formal contract for such use of the crane and operator was introduced in evidence by respondent.

The Ohio Law That Should Have Been Followed

We respectfully submit that, under those facts, the following case clearly charts the course that the District Court should have taken:

Manchester v. *Youngstown Sheet & Tube Co.*, 46 N. E. (2) 780: (Ohio Court of Appeals, June 4, 1937) Syl. 1.

"If, with a view to expediting business or furthering interests of general master, servant assists servants of another in their work, he is not a 'fellow servant' of those whom he is assisting although, acting under general orders from his employer to assist such servants, he does so at their request." Syl. 2.

"Where master hires out, under rental agreement, services of employee for operation of instrumentality, without relinquishing power to discharge servant, legal presumption is that, *though hirer directs servant, servant remains the 'servant' of the general employer, and his negligence constitutes that of the general employer.*" (Italics ours.)

(From opinion:)

"Plaintiff's decedent, Don Yeager, was an employee of the Rust Engineering Company, an independent contractor, doing certain work for the defendant on the construction of a new mill. * * * The Rust Engineering Company, in doing its work under its contract with the Youngstown Sheet & Tube Company, defendant herein, frequently needed the use of a crane, and there had been some arrangement * * * by which the Rust Engineering Company could use in their work as independent contractor, the crane. Dzuracki was the crane man, and when he went to work the day of the accident, he was ordered by his foreman, an employee of the Youngstown Sheet & Tube Company, to go and operate the crane. * * *.

* * * A bucket of concrete was fastened to the crane and the operator was directed by a foreman of the Rust Engineering Company to take it to the west end of the mill, and on this trip the accident occurred. * * *

The first error urged in the brief of appellant (Youngstown Sheet & Tube Company) is that the court erred in failing to instruct the jury that the crane operator, Dzuracki,

was the servant of Rust Company at the time of the accident. It is the claim of appellant that Dzuracki, the operator of the crane, was at the time of the accident an employee of the Rust Engineering Company, the independent contractor, by reason of an agreement by and between the Rust Engineering Company and the defendant, that should the Rust Engineering Company need the use of this crane in its construction work, the defendant would supply it on request, and that *the Rust Engineering Company was given the exclusive right to use such crane until it had finished with it.* • • •

Was Dzuracki the servant of the engineering company or the servant of the defendant voluntarily assisting the engineering company in its work, in which the defendant company was interested? No compensation was to be paid Dzuracki by the Rust Engineering Company for service performed. He was paid for the services thus performed by defendant. The Rust Engineering Company could not have discharged Dzuracki. Of course, it might refuse his services if it saw fit, but could not discharge him as an employee. The Rust Engineering Company could use Dzuracki for no other purpose than the running of the crane • • • for the reason that *there was no legal obligation on the part of the defendant to carry out this arrangement* if it desired to not so do, as this arrangement was made subsequent to the making of the original contract • • • True, *it might be a moral obligation* • • • however, *not a legal one, quite clearly establishing that defendant had not resigned control over the craneman* Dzuracki.

This court is satisfied that under the evidence in this case *defendant-appellant* certainly *can not complain when the court permitted the jury to decide as to whether Dzuracki, at the time of the accident, was a servant of the Rust Engineering Company or of defendant.* • • • *There was*

no error on the part of the trial court in refusing to instruct the jury that Dzuracki was a servant of Rust Engineering Company at the time of the accident.'' (Italics ours)

It was the Duty of the Lower Courts to Apply the Law as Declared in the Ohio Case of Manchester v. Youngstown Sheet & Tube Co., (Supra).

Erie R. R. Co. v. *Tompkins,* 304 U.S. 64: Syl. 2.

"A federal court exercising jurisdiction over such a case on the ground of diversity of citizenship, is not free to treat this question as one of so-called 'general law,' but must apply the state law as declared by the highest state court."

Syl. 3.

"There is no federal general common law. • • • Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

The decision of the courts below are in conflict with the established law of this court.

Standard Oil Co. v. *Anderson,* 212 U.S. 215: Syl. 1.

"One in the general service of another may be so transferred to the service of a third person as to become the latter's servant with all the legal consequences of the new relation; but to change the relation and relieve the master requires more than the mere fact that the servant is sent to do work pointed out by such third party who has made a bargain with the master for his services."

Syl. 2.

"A winchman employed by the person furnishing the hoisting power to a master stevedore for loading a vessel, held to remain that person's servant notwithstanding the

hoisting signals were given by the stevedore's foreman, and not to be a fellow servant of an employee of the stevedore who was injured by his negligence." (affirming 152-Fed-166)

from opinion, Page 226:

"Much stress is laid upon the fact that the winchman *obeyed the signals of the gangman,* who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. *The giving of the signals under the circumstance of this case was not the giving of orders, but of information and the obedience of those signals showed co-operation rather than subordination and is not enough to show that there has been a change of masters.*" (Italics ours.)

We submit that Price, in the case at bar, merely gave signals—not orders—and Hall's obedience of those signals showed co-operation rather than subordination.

As the Ohio Court of Appeals aptly stated in its opinion in the case of *Manchester* v. *Youngstown Sheet & Tube Co., supra.,* (substituting the names of the parties herein for those mentioned in the *Manchester* case,)—"Was Hall the servant of the Eichelay Corporation or the servant of the defendant voluntarily assisting the Eichelay Corporation in its work, in which the defendant company was interested? No compensation was to be paid Hall by the Eichelay Corporation for services performed. He was paid for the services thus performed by defendant. The Eichelay Corporation could not have discharged Hall. Of course, it might refuse has services of it saw fit, but could not discharge him as an employee. The Eichelay Corporation could use Hall for no other purpose than the running of the

crane * * * for the reason that there was no legal obligation on the part of the defendant to carry out this arrangement if it desired to not so do, as this arrangement was made subsequent to the making of the original contract * * * True, it might be a moral obligation * * * however, not a legal one, quite clearly establishing that defendant had not resigned control over the craneman, Hall."

We contend that on the testimony elicited in this case the District Court should have permitted the jury to decide as to whether the crane operator, at the time of the accident, was a servant of the independent contractor or of respondent: that it was error on the part of the District Court to grant the motion for peremptory instructions and to enter judgment for respondent: that it was the duty of the Court of Appeals to reverse said judgment; and the action of the District Court and the Court of Appeals should be reversed.

Respectfully submitted,

SAMUEL T. GAINES
Counsel for Petitioner.

FILED
JUL 27 195
CHARLES ELMORE CR

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1951

No. 129.

EDWARD McANDREWS,
Petitioner,

v.

E. W. BLISS CO.,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

JAMES A. BUTLER,
Bulkley Building,
Cleveland 15, Ohio,
Attorney for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9547

INDEX.

Opinions Below ---------- 1

Jurisdiction ---------- 1

Question Presented ---------- 1

Counter-Statement of Case ---------- 2

Argument ---------- 3

I. Ohio Law ---------- 3

II. Federal Decisions ---------- 5

III. Usual Judicial Proceedings ---------- 6

TABLE OF AUTHORITIES.

Cases.

Denton v. Yazoo & Mississippi Valley Railroad Co., 284 U. S. 305 (1932) ---------- 5

Erie R. R. Co. v. Tompkins, 304 U. S. 64 (1938) ---- 5

Halkias v. Wilkoff Co., 141 O. S. 139 (1943) ------ 4, 5

Manchester v. Youngstown Sheet & Tube Co., 18 O. O. 503, 46 N. E. (2) 780 (1937) ---------- 3

Standard Oil Co. v. Anderson, 212 U. S. 215 (1909) 5

Text.

27 *American Jurisprudence*, 511, Sec. 32 ---------- 4

Statutes.

28 U. S. C., Section 347 ---------- 1

28 U. S. C., Section 1254 (1) ---------- 1

In the Supreme Court of the United States

OCTOBER TERM, A.D. 1951

No. 129.

EDWARD McANDREWS,

Petitioner,

v.

E. W. BLISS CO.,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

OPINIONS BELOW.

The opinion of the District Court is found at page 127 of the record. The opinion of the U. S. Court of Appeals for the Sixth Circuit is reported at 186 F. (2d) 499.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1). Petitioner's brief cites the former analogous Section 28 U. S. C., Section 347.

QUESTION PRESENTED.

Is an employer liable for the alleged negligence of his general employee who at the time of the accident was in the special service of an independent contractor over whom the employer had no control?

COUNTER-STATEMENT OF CASE.

E. W. Bliss Company, is engaged in the manufacture of rolling mill machinery at its plant at Salem, Ohio. The factory is equipped with several overhead travelling cranes.

Bliss made a contract with the Eichleay Corporation, an independent contractor, to dismantle an old overhead crane and install a new one in the welding room in the Bliss plant, which had been equipped with two overhead cranes. The work was done over the week end of May 8-9, 1948, at a time when Bliss did none of its regular work in the welding room. (R. 76-77.) That room was turned over to Eichleay to change the cranes. (R. 77.) Except for the maintenance crew, the entire plant was shut down. (R. 81.)

At the request of Eichleay, Bliss assigned to Eichleay's foreman, Norman O. Price, a crane operator, Jerry Hall. Hall was instructed to work as directed by Price. He was to do nothing for Bliss that day. (R. 77.)

ARGUMENT.

Petitioner asserts three reasons for the allowance of the Writ. He claims the decisions of the District Court and of the Court of Appeals (a) failed to follow Ohio law, (b) are in conflict with Federal decisions, and (c) depart from usual and accepted course of judicial proceedings. We believe the reasons asserted by petitioner are without foundation.

I.

Ohio Law.

Petitioner cites *Manchester v. Youngstown Sheet & Tube Co.*, 18 O. O. 503, 46 N. E. (2) 780. This case was decided by the Mahoning County, Ohio, Court of Appeals in 1937. The facts are easily distinguishable from the instant case. In the *Manchester* case, plaintiff's decedent had been an employee of a contractor doing work in defendant's plant. An overhead crane was involved. However, the defendant was doing other work in the same room in which the accident occurred. Defendant's own employees were engaged in construction work creating a hazard to the decedent of which he had not been warned.

The craneman, a regular employee of defendant, merely performed routine lifting operations for the contractor. He was not under the personal supervision of the contractor. The craneman negligently operated the crane so as to cause it to strike a rope holding a heavy pipe which was part of the work being done by defendant's own employees. The immediate causes of the accident were defendant's failure to warn decedent of his position of peril near defendant's own work, and defendant's failure to warn the crane operator to keep clear. No circumstances of that character are found in the instant case.

Ohio law applicable to the facts with which we are involved was decided by the Supreme Court of Ohio in *Halkias v. Wilkoff Co.*, 141 O. S. 139, decided 1943. Halkias, a painter, was an employee of a painting contractor doing work in defendant's plant. He was injured by an overhead electric crane, operated by one Ferarra, a regular employee of defendant. At the same time, the painting contractor was doing work, another contractor, John L. Joyce Co., was also engaged in installing concrete floors in the same building. A foreman of the Joyce Co. desired the use of defendant's crane to lift some material. He requested Ferarra to operate the crane for this purpose. Ferarra did so; and while moving the crane, injured plaintiff.

The Ohio Supreme Court found that at the time of the accident, Ferarra was working under the direction and control of the Joyce Co. and not of the defendant. Judgment was entered for the defendant. In its opinion, the Ohio Supreme Court reviewed many authorities on the subject of loaned servant. The court said:

> "* * * when one person lends his servant to another for a particular employment, the servant for anything done in that particular employment must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

The Court also quotes with approval from 27 *American Jurisprudence*, 511, Sec. 32, as follows:

> "If the employer temporarily loans his general servant to assist the contractor, and the servant thereby comes under the control of the contractor, the original relation of master and servant ceases and the contractor alone is liable for negligence of the servant while he has control of his movements."

II.

Federal Decisions.

Petitioner cites *Erie R. R. Co. v. Tompkins,* 304 U. S. 64, decided 1938. We agree with the holding of that case requiring the Federal Court, in cases based upon diversity of citizenship, to apply the state law as declared by the highest state court. The District Court and the Court of Appeals did follow applicable Ohio law as announced by the Supreme Court of Ohio in *Halkias v. Wilkoff Co., supra.*

Standard Oil Co. v. Anderson, 212 U. S. 215, decided 1909, presents facts distinguishable from the instant case. In the *Standard Oil* case, the work being done was that of the general master. The winchman had not passed under the direction and control of the independent contractor performing the stevedore work. Standard Oil Co. agreed with the master stevedore to hoist the cargo from pier to ship's hold for $1.50 per thousand. This agreement involved furnishing power, the winch, the drum, and the winchman. Anderson claimed his injury was caused by the winchman lowering a draft of cargo before getting the signal so to do, and at a time when plaintiff was not expecting that movement. In the instant case it is undisputed that the craneman, Hall, operated the crane precisely as directed by the Eichleay foreman.

A more recent Federal decision on this subject is *Denton v. Yazoo & Mississippi Valley Railroad Co.,* 284 U. S. 305, decided 1932. The Supreme Court commented upon the earlier decision of *Standard Oil Co. v. Anderson, supra.* The court found no liability on the defendant railroad whose general employee, a porter, was engaged in loading mail into a railway mail car under the direction of a U. S. postal transfer clerk. The Supreme Court held that the railroad was not liable for the porter's claimed

negligence, because at the time of the accident the work being done was that of the Post Office Department and not of the railroad.

III.

Usual Judicial Proceedings.

Petitioner has failed to assert any reason in support of his contention that the decisions below departed from the usual and accepted course of judicial proceedings. To the contrary, the decisions below in this case are in harmony with the usual and accepted course of judicial proceedings as set forth above.

CONCLUSION.

Respondent prays that petitioner's petition for writ of certiorari be denied.

Respectfully submitted,

JAMES A. BUTLER,

Attorney for Respondent.

July 26, 1951.